NA 03-0101-C B/H Badger v Clark County Schools [2]
Judge Sarah Evans Barker Signed on 6/1/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

ROBERT BADGER,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 4:03-cv-00101-SEB-WGH
	)	
GREATER CLARK COUNTY SCHOOLS,	)	
BOARD OF SCHOOL TRUSTEES,	)	
DAVID PULLIAM,	)	
ROBERT FIELDS,	)	
ROBERT MCEWEN,	)	
MICHAEL HENNEGAN,	)	
CHARLES GREGORY,	)	
BILL HALTER,	)	
TWYMAN PATTERSON,	)	
SHERYL YODER,	)	
	)	
Defendants.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ROBERT BADGER, Plaintiff, vs. GREATER CLARK COUNTY SCHOOLS, et al., Defendants.	))))))))	4:03-CV-101-SEB-WGH

ENTRY GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR RECONSIDERATION

This matter is before the Court on Defendants' Motion for Reconsideration of our February 15, 2005, order granting in part (with respect to Plaintiff's claim of defamation per se) and denying in part (the remaining claims) Defendants' Motion for Summary Judgment.

The case at bar stems from the alleged wrongful termination of plaintiff Robert Badger ("Mr. Badger") by the Greater Clark County Schools, (Jeffersonville, Indiana). Also named as Defendants are the former (now deceased) Superintendent David Pulliam ("Supt. Pulliam), and then-School Board Trustees Robert Fields, Robert McEwen, Michael Hennegan, Charles Gregory, Bill Halter, Twyman Patterson, and Sheryl Yoder (collectively the "School"). Defendants contend that Mr. Badger was discharged for making homosexual advances towards and offering alcohol and drugs to minor-aged students during a Halloween party at his house in 2002. Mr. Badger denies these allegations.

For the reasons stated below, we decline to reconsider our February 15, 2005, order on summary judgment, except to the extent that we conclude that the state tort claims against the individual School Board members may be dismissed in that they are barred under state law.

Factual Background

We adopt the factual summary detailed in our February 15, 2005, order. See Badger v. Greater Clark County Schools, 2005 WL 645152 (S.D.Ind. 2005).

Legal Analysis

I. *Standard of Review*.

Defendants bring their motion to reconsider pursuant to Federal Rule of Civil Procedure 54(b), which provides, in relevant part, that "any order or other form of decision, however designated, which adjudicates fewer than all the claims . . . is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Under Rule 54(b), the trial court has broad discretion to amend or revise an order before the entry of judgment on all claims and all parties.

II. *Defendants' Motion for Reconsideration.*

After presenting woefully inadequate briefing and evidence in connection with their initial motion for summary judgment, Defendants now seek a "second bite at the apple," under the guise of their motion to reconsider. A review of their motion discloses that the reconsideration they seek is in name only because the substance of their motion is more accurately a successive plea for summary judgment. Our prior ruling appears to have served only as an advisory opinion on the basis of which subsequent discovery and renewed briefing have culminated in the current motion. However, summary judgment is not tantamount to a game of preschool T-Ball allowing Defendants to keep swinging until they hit the ball (with advice from the Court after each miss). Recognizing the potential for an endless stream of successive motions for summary judgment, and for the reasons stated below, we, with one narrow exception, decline to exercise our discretion to reconsider our February 15, 2005, order,

and shall set this case for trial where any and all factual issues can be finally resolved.

A. *Deficiencies in Defendants' Motion for Reconsideration.*

Defendants have attempted to supplement the factual record with several affidavits and supporting documents which could have, and probably should have, been introduced along with their motion for summary judgment. Defendants have not demonstrated that any of the subsequent evidence they produced was newly discovered or unknown to them until after our February 15, 2005, order on summary judgment, nor have Defendants indicated they could not have discovered and produced such evidence in connection with their summary judgment motion if they had conducted reasonable discovery at that time.[1] The Court will not expend additional time and effort to revisit Defendants' theories advanced in this piecemeal fashion. Accordingly, we decline to consider any of the newly submitted evidence from Defendants.[2]

In addition, inexplicably, Defendants have attempted to advance in their motion to reconsider some of the same legal arguments that were raised and specifically rejected during summary judgment.[3] We are at a loss to explain why Defendants think we will or should rule

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[1] Defendants' derelictions are compounded by the fact that in our order dated March 23, 2005, we specifically rejected Defendants' attempt to submit such exhibits under seal pending a ruling on the Motion for Reconsideration. Defendants apparently did not understand the clear import of that order as, subsequent to our order, they repeatedly cited to the affidavits and documents which were never admitted into the record.

[2] For similar reasons, we decline to consider Plaintiff's belatedly submitted affidavits and exhibits.

[3] For example, Defendants argue that "Mr. Badger also presents no evidence to rebut the School's position that constitutional safeguards were satisfied through the meetings and interviews that were conducted when he had the opportunity to present his version of events." Defs'. Reply Brief in Supp. of Mot. for Recons. at 8. Defendants' argument ignores our determination in the ruling on summary judgment that "the meetings between Mr. Badger and School administrators did not satisfy the requirements of the Fourteenth Amendment. . . ."

(continued...)

any differently the second time around.

Defendants have also advanced several new legal arguments which they failed to raise at summary judgment. Defendants' motion for reconsideration makes clear that they did not "wheel out all their artillery" at the summary judgment stage. See Caisse Nationale de Credit Agricole v. CBI Industries, 90 F 3d 1264, 1270 (7th Cir. 1996) (citations omitted). In fact, in their motion for reconsideration, Defendants have produced a fresh, new volley of statutes and case law which they claim supports their position. These new legal arguments, instead of focusing on errors of law or fact committed by the Court, seem primarily directed at backfilling for their inadequate preparation and arguments previously included in their summary judgment briefing.[4]

For these reasons, we decline to exercise our discretion under Rule 54(b) to reconsider our prior order on summary judgment, with the one exception noted below.

B. *Indiana Tort Claims Act*.

The only legal theory advanced by Defendants which we shall consider here is their affirmative defense that the Indiana Tort Claims Act bars Mr. Badger's state law tort claims against the individual School Board members. Although Defendants failed to raise this defense previously, they did assert the Indiana Tort Claims Act as an affirmative defense in their Answer

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[3](...continued)
Badger v. Greater Clark County Schools, 2005 WL 645152, *5 (S.D.Ind. 2005).

[4] Defendants devote considerable attention to the apparent inconsistency between granting summary judgment on Plaintiff's defamation claim and denying summary judgment on his other claims. Given that the allegations underlying Mr. Badger's defamation claim are distinct from the other claims, as well as more narrow, we find no inconsistency between the two holdings.

to Mr. Badger's Complaint. See Defs.' Answer at p. 6.[5]

Mr. Badger's Complaint seeks to hold the School Board members individually liable for the state-law tort claims of defamation and intentional infliction of emotional distress; however, the Indiana Tort Claims Act expressly forecloses liability on the part of the individual board members in their personal capacity in such situations. The relevant Indiana Code section states:

> Civil actions relating to acts taken by a board, a committee, a commission, an authority, or another instrumentality of a governmental entity may be brought only against the board, the committee, the commission, the authority, or the other instrumentality of a governmental entity. *A member of a board, a committee, a commission, an authority, or another instrumentality of a governmental entity may not be named as a party in a civil suit that concerns the acts taken by a board, a committee, a commission, an authority, or another instrumentality of a governmental entity where the member was acting within the scope of the member's employment*. For the purposes of this subsection, a member of a board, a committee, a commission, an authority, or another instrumentality of a governmental entity is acting within the scope of the member's employment when the member acts as a member of the board, committee, commission, authority, or other instrumentality.

I.C. § 34-13-3-5(a) (emphasis added).

Because Mr. Badger had never alleged that the School Board members acted in any capacity other than in their official capacity as board members, we conclude the clear language of the § 34-13-3-5 bars Plaintiff's state law tort claims against the individual board members.

III. *The Retraction by Mr. Hatcher of his Sworn Affidavit.*

The last matter we address here is the withdrawal by one of Mr. Badger's two accusers, Mr. Hatcher, of his affidavit, indicating that he will no longer swear to the truth of the matters previously attested to there. Defendants had submitted Mr. Hatcher's affidavit in support of

[5] Defendants do not explain their failure to assert this defense at summary judgment.

their motion for summary judgment.[6] Mr. Hatcher's accusations, along with the nearly identical allegations of his companion, Mr. West, allegedly formed the primary basis for the School's decision to terminate Mr. Badger, to oppose his request for unemployment benefits, and to defend against the Plaintiff's claims in the case at bar. Further, there is evidence to suggest that Mr. Hatcher has reported that, when drafting the affidavit, School administrators changed, modified, or omitted some of his words and statements in order to create an affidavit that better suited the School's legal theories.[7] What is the Court to make of Mr. Hatcher's allegation that

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[6] Mr. Hatcher's deposition testimony is as follows:

Q: Are you swearing that this is the truth in this affidavit?
A: Not this (indicating [the affidavit]). I mean, there's a few mistakes in there, but I'm not going to swear to it right now.

Hatcher Dep. at 160. Defendants have failed to acknowledge this somewhat startling development by Mr. Hatcher, either in their briefings or otherwise. No notice to the Court has been forthcoming to indicate that an affidavit which they submitted no longer constitutes sworn testimony. We find this quite troubling, especially since we have previously specifically reminded counsel for both parties of their obligations to the Court under Indiana Rule of Professional Conduct 3.3 (Candor Toward the Tribunal). See Badger v. Greater Clark County Schools, 2005 WL 645152, *10 n.38 (S.D.Ind. 2005).

Given that Mr. Hatcher's affidavit is practically word-for-word identical to the affidavit of Mr. West, counsel may want to ascertain whether Mr. West also wishes to disavow the truth of his affidavit.

[7] Mr. Hatcher explained why he agreed to some of the School's changes as follows:

Q: And [Ms. Luna, a School counselor] chose not to use that language in this affidavit?
A: Right.
Q: Why?
A: Because – I don't know.
Q: Did she say it didn't sound good enough for your case?
A: I guess it didn't sound good enough for her.
Q: For her. So she changed it to make it sound better for her?
A: I guess.
Q: And you went along with it, because it was kind of true; right?

(continued...)

school officials drafted his affidavit in a manner that created a more damning picture of Mr. Badger's conduct than was actually true?

The "creative" drafting of Mr. Hatcher's affidavit was not without consequence in terms of our prior analysis and conclusions. Those assertions created what now seems an unjustified impression of the disparity between what Mr. Badger maintained occurred at his Halloween party and what his accusers claimed happened there.[8] Moreover, after reviewing the summary judgment briefs submitted by Defendants, we believe that large portions are misleading, if not

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[7](...continued)

A: Well, because I was probably 16 at the time, and I don't know anything about this stuff.
Q: Okay.
A: You know, I'm just trying to do what I can do, because they want me to do this stuff. You know, teacher doing this stuff is not supposed to be a teacher [sic]. Okay. That's the only reason I went along with this.

Hatcher Dep. at p. 149.

[8] For example, we previously stated:

> We are left to wonder why the School chose to believe the two boys, who, themselves, admittedly had been drinking at the time and when no other witness at the Party corroborated their tale in any of its particulars.
>
> [Footnote] All the other witnesses testified that the two boys were present at the Party and that they were drinking alcohol. There is unanimous agreement as well that the boys were uninvited guests at the adult portion of the party, that they arrived intoxicated carrying their own liquor, and that they were promptly asked to leave. See Aff. of Robert Badger at ¶¶ 3-5, 11-13; Aff. of Ronette Smith at ¶¶ 7-9; Aff. of Daniel Koch at ¶¶ 4-8; Aff. of William T. Keeler, Jr. at ¶¶ 3-7. In addition to the three individuals who submitted affidavits in his support, Mr. Badger has provided the names of five other individuals who allegedly would also corroborate his version of events.

Badger v. Greater Clark County Schools, 2005 WL 645152, *9 (S.D.Ind. 2005) (quoted text includes footnote 34). Our confusion, it appears now, was almost entirely due to the manner in which the School drafted the affidavits of the two boys.

outright false, in light of Mr. Hatcher's revised version of events.[9]

Although Defendants seem primarily responsible for this recent turn of events, we should note that the belated unearthing of Mr. Hatcher's retraction of his prior sworn statement is the direct result of Plaintiff's failure during the prescribed discovery period to conduct depositions or even apparently to request that depositions be conducted. Regardless of blame, Mr. Hatcher's retractions further reinforce our conclusion that a trial is necessary to sort through the tangle of disputed facts at issue in the case at bar and to make the final credibility assessments.

Conclusion

For the reasons detailed above, Defendants' Motion for Reconsideration is DENIED, except with respect to Plaintiff's state law tort claims against the individual School Board members, which claims are barred under Indiana law as to these individual defendants only and thus dismissed. In all other respects, our order denying in part and granting in part Defendants' Motion for Summary Judgment is AFFIRMED. The briefs submitted on the Motion for Reconsideration shall be deemed pre-trial briefs and no further submissions of that sort shall be required.

[9] For example, during summary judgment, Defendants argued: "The School was put in the position of deciding whom to believe under these circumstances, the two boys or Mr. Badger. Given all of the circumstances . . . the Superintendent chose to believe the two boys' version of the facts (at least with respect to the alcohol and drug issues)." Defs.' Reply Brief in Supp. of Summ. J. at p. 9. This statement is misleading for several reasons because, in fact, there now appears to be substantial agreement between Mr. Badger and Mr. Hatcher on the facts underlying the alcohol issue. For example, there is no dispute between Mr. Badger and Mr. Hatcher that the teenagers illegally obtained vodka outside the party, illegally consumed the vodka outside the party, and that those activities took place outside Mr. Badger's presence and without Mr. Badger's knowledge.

Date: _____

_____
SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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